

Between disbelief and indifference: Are the “environmentally displaced” refugees under the extended definition of the Cartagena Declaration?

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Abstract

According to recent research, the number of individuals fleeing from their countries due to natural disasters (i.e. famine, floods, droughts, landslides) doubles the current number of refugees in the European Union. Despite of this, governments all over the world are not acting to reduce their emissions and avoid further damage to the environment. As natural disasters are becoming more common and its victims are increasing by the thousands, it is mandatory to review the immigration status of the people that is forced to seek refuge in a third country and their possibility to apply for refugee status. Against this background, this essay aims to review the extended refugee definition in the Cartagena Declaration, relied upon by the Inter-American Court of Human Rights, in order assess whether the environmentally displaced may be included in the current categories.

The investigation will review the extended refugee definition in the Cartagena Declaration, taking account of the 1951 Refugee Convention and other relevant provisions of human rights law, in Against this background, this essay aims to review the extended refugee definition in the Cartagena Declaration, relied upon by the Inter-American Court of Human Rights, in order assess whether the environmentally displaced may be included in the current categories. order to determine whether it is possible to provide refugee status to victims of natural disasters. For that purpose, definitions such as “well-founded fear”, “persecution” and “public order” will be reviewed. Finally, a summary of conclusions will be provided, pointing the way forward.

Key Words: Refugees, Displaced, Climate Change, Natural Disasters, Persecution, Cartagena Declaration.

Resumen

Según investigaciones recientes, el número de personas que huyen de sus países debido a desastres naturales (hambre, inundaciones, sequías, deslizamientos de tierra) duplica el número actual de refugiados en la Unión Europea.

A pesar de esto, los gobiernos alrededor del mundo no están actuando para reducir sus emisiones y evitar mayores daños al medio ambiente. A medida que los desastres naturales se vuelven más comunes y sus víctimas aumentan en miles, se vuelve obligatorio revisar el estado migratorio de las personas que se han visto forzadas a buscar refugio en otro país y su posibilidad de solicitar la condición de refugiado. En este contexto, este ensayo tiene como objetivo revisar la definición extendida de refugiado en la Declaración de Cartagena, invocada en la Corte Interamericana de Derechos Humanos, para evaluar si los desplazados ambientales pueden incluirse en las categorías actuales.

Palabras Clave: Refugiados, Desplazados, Cambio Climático, Desastres Naturales, Persecución, Declaración de Cartagena

I. Introduction

The number of individuals fleeing away from their countries due to natural disasters (i.e. famine, floods, droughts, landslides) is increasing and soon it might double the current number of refugees in the European Union. Despite of this, governments such as the United States don't act to reduce their emissions in order to avoid further damage to the environment.

Because natural disasters are becoming more common and its victims are increasing by thousands, it is mandatory to review the immigration status of the people that are forced to seek refuge in a third country and their possibility to apply for a refugee status.

Against this background, this article aims to review the extended refugee definition in the Cartagena Declaration,

relied upon by the Inter-American Court of Human Rights, in order to assess whether the environmentally displaced may be included in the current categories.

The investigation will review the extended refugee definition in the Cartagena Declaration, taking into account the 1951 Refugee Convention (Hereinafter “the Convention”) and other relevant provisions of human rights law, in order to determine whether it is possible to recognize the refugee status to victims of natural disasters. For such purpose, definitions such as “*well-founded fear*”, “*persecution*” and “*public order*” will be reviewed in detail. Finally, a summary of conclusions will be provided, pointing the way forward.

II. Environmental displacement and cross-border movement

In the subject of displacement due to climate change and/or natural disasters there is no consensus regarding the applicable terminology, the protection that should be granted to the victims and the reasons of such displacement. In that context, Essam El-Hinnawi was one of the first ones who provided a definition for environmental refugees in 1985. According to his definition, environmental refugees are “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.” (Docherty & Giannini, 2009, p. 357).

It is important to note that such definition can be divided in two elements whose lack of specificity raise a difficulty in its application:

- i) People who have been forced to leave their traditional habitat, temporarily or permanently [...]

Although it is clear that one of the main factors to become an environmental refugee is leaving a person’s traditional habitat, it is necessary to clarify whether such movement must be within the country’s borders or cross-border movement. The nature of the movement will depend entirely of the magnitude of the event.

In case of natural disasters located in a specific area of a country, it would not be necessary for the people to cross borders. Therefore, the people that are fleeing away from their habitat would not be considered as refugee since one of the conditions of being a refugee is to cross the border movement. In this case they would be considered as an Internally Displaced Person (IDPs). Such definition is included in the 1998 United Nations Guiding Principles on Internal Displacement, where it is stated that IDPs are people who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result or in order to avoid the effects of (...) natural or human made disasters, and who have not crossed an internationally recognized State border. (UNHCR, 1998).

In contrast with the IDPs who are protected by international instruments that establish the responsibility of their government towards them, people that are forced to flee outside their country due to natural disasters are apparently unprotected. If the natural disaster was of enough magnitude that the whole territory was affected and the government would not be able to protect its citizens, people would be obliged to cross their borders looking for safe haven without the possibility of regularizing their immigration status and under the risk of being deported.

Even though some countries have taken action by providing assistance in such cases (the USA granted temporary residence to Haitian nationals who were in its territory after the earthquake of 2010 (Schulz & Batalova Jeanne, 2017)), a permanent solution is needed, as the cases of cross-border movement due to natural disasters are increasing.

Although it appears that there is no instrument protecting the rights of the people subject to cross border movement due to climate change, there are regional instruments that could fill the gap left by the Convention. Therefore, if people are forced to move outside their country, they might be subjected to the protection of the Cartagena Declaration (Hereinafter, the Declaration), the Organization for African Unity Refugee Convention (Hereinafter, OAU), etc. This would be possible since they comply with one of the main requirements, which is being outside their country of origin or permanent residence. Nevertheless, aside from being outside of their country they must comply with other requirements established by the Declaration, which will be developed further in this essay.

- ii) [...] because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.

It is important to highlight that environmental disruption according to the author of the definition meant “any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life.” (Docherty & Giannini, 2009, p. 363). Such disruption might have natural or man-made causes. Regarding the natural causes, they might be earthquakes, floods or tornados, droughts or any other disaster occurred with no human interference. On the other hand, the disasters triggered by people are the ones caused by human technology, activities or infrastructure.

Additionally, a difference should be made between sudden onset (earthquakes, hurricanes, etc.) and slow onset disasters (rise of the sea level, droughts, etc.), which will be reviewed in detail in the following paragraphs.

a) Slow onset natural disasters and forced displacement

Slow onset natural disasters are the ones that cause degradation in the environment overtime. Events such as rising sea levels, increased salinization of groundwater and soil, droughts and desertification are considered slow onset disasters. “While they may be distinct from rapid-onset extreme weather events, slow-onset disasters can cause catastrophic disruption to society, the economy and the environment of one or more countries. The manifestation of slow-onset climate change processes may also increase the frequency and severity of other environmental disasters.” (UNHCR, 2011, p. 8).

Unlike rapid-onset disasters, the impact of slow onset disasters prevail over time and have the potential to turn inhabitable areas that were once the habitat of millions, forcing permanent displacement to other areas of the same country or crossing the borders to a third country in case the disaster made the territory of a certain country inhabitable, as it might happen to the Pacific Islands of Tuvalu and Kiribati due to the rise of the sea level. However, despite of this scenario, the international community usually turns its back to such events and focus primarily on sudden onset disasters. The reason for the indifference of international community to slow onset disasters is simple, in early stage they do not force the inhabitants of a certain area to flee, as its destructive effects will appear gradually. Therefore, even though the habitants of a certain area could foresee that a disaster will occur and leave the area, such movement of people would be considered as voluntary or even “economic migration”. Hence, in the beginning of the environmental degradation process, “*circular or seasonal migration of individual family members in order to sustain the survival of the family living in affected areas is likely to occur initially as an adaptation strategy.*” (Kälin & Schrepfer, 2012, p. 41). Nevertheless, in the most advanced stages the movement of people become forced.

It is noteworthy that in early stages of slow onset disasters, there are various reasons that make people flee their habitat, such decision is never limited to the disaster itself. The main reasons that may start an influx of migrants, in the context of a slow onset disaster are the following:

- **Economic reasons:** Moving to seek better opportunities or a better quality of life gives the victims of the disasters (if they move before their life or health is threatened) the appearance that they are moving voluntarily for economic reasons. Sadly, the people that are more vulnerable to such disasters are the low-income families whose income comes from the exploitation of natural resources (for example, agriculture, fishing and hunting or stock breeding). However, those natural resources are the ones being affected by the slow onset disaster.

Unfortunately, in a scenario in which people are fleeing their country due to slow onset disaster, such as the rise of the sea levels or droughts, they would not be protected by the Convention nor by any other instrument due to the fact they are considered economic migrants that moved voluntarily and therefore do not comply with the main requirements of the Convention.

- **Unwillingness or inability to prevent:** Slow onset disasters affect not only poor nations, they also affect wealthy nations that have enough resources to carry out preventive policies. “Crisis prevention could consist of either attempting to eliminate the need for migration or preparing to handle it in

an organized way. The Netherlands, for example, is combating rising sea levels with high-tech flood management and river and sea defenses, which are designed to keep the state habitable.” (Docherty & Giannini, 2009, p. 349).

However, most of the poor countries that are getting hit by slow onset disasters have no resources to carry out prevention policies as The Netherlands. Furthermore, people are forced to flee not only because the natural disaster itself or the lack of labor opportunities, they are also forced to leave due to the unwillingness or inability of a state to prevent a natural disaster either in a certain area or in the whole country.

- **Resource-based conflicts:** The lack of resources in a certain area due to a slow onset disaster might start because of the creation of factions that fight over their control. *Due to the nature of the resource-based conflict, they may be particularly challenging at the operational level. In particular where the resource scarcity cannot be resolved.* (McAdam, 2011, p. 11).

As well as in the previous cases, in the resource-based conflicts, the main element that triggers the conflict is the slow onset natural disaster that is occurring in certain areas and producing scarcity of basic products for survival. Nevertheless, the movement of people is not caused by the disaster itself, but by the conflict that arises from it. The people fleeing the situation described in this point could be considered as war refugees instead of an environmental refugee, due to the fact they are fleeing a situation of indiscriminate violence among parties that dispute the control of natural resources. As for the duration of such displacement, it would be indeterminate as not only the area would be inhabitable, but the situation of violence would jeopardize the human rights of the population.

“Since such a wide range of scenarios can be caught under the ‘climate displacement’ umbrella, no single legal or policy response is appropriate or able to address them all. However, existing legal frameworks seem better equipped to respond to disaster-related movement (contemplated by weather ‘events’), and less able to accommodate pre-emptive movement on account of slower-onset processes.” (McAdam, 2011, p. 11).

b) Sudden onset natural disasters and forced displacement

Sudden onset disasters are events of force majeure that occur violently and leave the population or governments a short amount of time or even no time to take preventive measures. An example of such events are flooding, earthquakes, landslides, hurricanes or even volcano eruptions, among others. As these events may cause massive destruction in a short timeframe, people are usually forced to leave their habitats in order to find safe haven, either if it is inside their countries or abroad.

Although throughout the history sudden onset disasters have caused internal movement of people, due to the climate change such disasters have become more destructive. The increased intensity of sudden onset disasters has caused the inhabitants of poor countries to flee to another territory due to two main factors: i) The sudden onset disaster affected most of the territory of their home state, such as the Haiti earthquake in 2010 or ii) the inability of a government to carry out corrective measures in the aftermath of the disaster.

Certainly, in a scenario in which their human rights are in jeopardy, people would usually flee their country in order to find safe haven. However, as in the case of slow onset disasters, people that flee from their home country remain *“largely unprotected, with the exception of the human rights prohibition of forcibly returning them to a country where they would risk to be exposed to serious dangers for life and health. Otherwise, no specific protection exists for them in present international law.”* (Kälin & Schrepfer, 2012, p. 40).

Even though the people fleeing a sudden onset natural disaster would comply with the requirement of being outside of their country of origin or permanent residence; in order to be considered a refugee they would have to argue that they are being subject to persecution. A priori, unless a government or a third party utilizes discriminative criteria to provide assistance to the victims (denying humanitarian assistance to a specific group of people due to their religion, political beliefs, etc.) they would not be recognized as refugees, due to the lack of the element of persecution.¹ Despite of the restrictive interpretation of persecution provided by the Convention,

¹ Despite the fact that there are no legal instruments that protect people fleeing from their countries due to sudden onset disasters, some governments grant temporary residence to the victims of neighbor countries. “For instance, persons found temporary refuge in

regional instruments as the OAU Convention² in Africa and the Cartagena Declaration³ in Latin America have avoided this issue by expanding the definition, including in the causes for being a refugee the situation in which a government is unable or unwilling (for example due to the destruction of its infrastructure in a natural disaster) to satisfy its citizen’s basic rights. In addition, the regional instruments also include broader options to support asylum applications, which will be discussed later. Therefore, the asylum seekers could argue a situation of disturbance of public order caused by a natural disaster. In fact, such interpretation is not widely accepted, in the next part of this essay we will review the definitions of persecution, public order, among others, in order to clarify if it would be possible to provide protection to people fleeing from natural disasters according to regional instruments such as the Cartagena Declaration.

b) What about “man-made” disasters?

We talk about direct man-made disasters when environmental disruption is caused by human technology, development of economic or industrial activities or infrastructure. In that sense, to qualify as a man-made disaster there must be a strong causal link between the disaster itself and its causes, either by direct or indirect human action, for example: Chernobyl’s nuclear disaster. In such event, the city of Prypiat and its surroundings had to be evacuated due to the overheating of a nuclear reactor, causing thousands of people to be displaced permanently and being subject to radiation diseases.

Until now, the difference between man-made disasters and natural disasters seems clear. However, when we talk about indirect man-made disasters the line gets blurry as the same natural disaster might have a combined origin. Following this, some authors, “note that either nature or humans can cause harm. In some cases, the distinction is obvious. An earthquake exemplifies the former, while flooding from a man-made dam exemplifies the latter. In the climate change context, this distinction is complicated. A hurricane can be a natural phenomenon or a result of anthropogenic climate change. Therefore, according to the IPCC, identifying causation can be scientifically challenging.” (Docherty & Giannini, 2009, p. 366)

III. “Environmental refugees” under the 1951 Convention: Outright exclusion?

In order to tackle the controversy of the exclusion of “environmental refugees” under the Convention, it is important to determine what is the first condition that turn a displaced person into a refugee. In order to carry out such task, it is convenient to start with the definition provided by the Convention according to which a refugee is defined as a person who:

“[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁴

the United States after Hurricane Mitch had destroyed vast tracts of land in Honduras, Guatemala and other parts of Central America in 1998. During a visit in Mozambique and South Africa in 2008 we heard anecdotal evidence that people from Mozambique and Malawi look for temporary refuge in neighboring countries quite regularly when displaced by flooding. [Kälin, W. & Schrepfer, N. (2012). *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches (1st Ed)*. UNHCR, pg. 40.]

2 Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969, entered into force on 06/20/1974. “All 41 States which were independent when the Convention was adopted in 1969 signed the Convention and more States have acceded to it as they became independent (...)” [UNHCR. (1992). *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)*; EC/1992/SCP/CRP.6 (06 April 1992), section C9]

3 It is noteworthy to remember that unlike the OAU Convention, the Cartagena Declaration (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984) is a regional instrument of a non-binding nature. Nevertheless, within the framework of the International Conference about Central American Refugees (CIREFCA) on 06/28/1994, “(...) the UNHCR, UNDP and a group of experts argued that although the Cartagena Declaration is not a Convention and, therefore, has no binding force, the process that the region experienced demonstrates that treaties’ formality and solemnity are not always needed, in order to implement an effective legal framework that the parties undertake to observe.” [Mondelli, J.I. (2018) *La fuerza vinculante de la definición regional de la Declaración de Cartagena sobre Refugiados (1984)*. San Jose, Costa Rica. Retrieved from <https://www.refworld.org.es/pdfid/5d03dob54.pdf>]

4 UN General Assembly. (1951). *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, Article 1A (2).

Certainly, some people are skeptical of this definition due to the fact they argue that it relies on subjectivities and issues that are often hard to prove, such as the fear of persecution. Such uncertainty is often seen as an open window for people that just want to abuse the refugee regulation and travel to rich countries to take advantage of the benefits of the host country, however as we will see in the following paragraphs this is not always true.

a. Alienage

In order to be considered as a refugee, a displaced person must comply with the requirements determined by the Convention. The first requirement is that a displaced person must be outside his country of origin or permanent residence⁵. Nevertheless, in order to fully comply with such requirement, voluntary movement is not enough, a person must be forced outside of his country due to the fact he has a well-founded fear of persecution⁶. Either if a person is forced to flee by a natural disaster or due to the fact his human rights are not being protected by his government, the key element is the potential harm or violence a person might be subjected due to the inability or unwillingness of a government to protect its citizens. *“With fundamental human rights at issue, a central feature triggering the international protection regime remains violence, or the risk or threat of violence; those who move because of pure economic motivation, pure personal convenience, or criminal intent are excluded.”* (James & Foster, 2014, p. 17).

According to the aforementioned, it is clear that the victims of a slow-onset natural disaster would have a hard time with such requirement. In example, as the cases of the rise of sea level is not considered to be the cause of forced migration due to its uncertainty, victims of slow-onset disasters would usually be considered economic migrants that voluntarily travel outside their country of origin to look for better conditions. Regrettably, this situation would only change when the disaster have caused human casualties.

Regarding the victims of a sudden-onset natural disaster, the causal nexus between the disaster and the harm caused to the people is clear. However, such causal nexus is not enough. On top of the harm caused by the natural disaster itself, the people would have to argue that they are forced to flee due to the inability or unwillingness of their government to protect their basic human rights after the disaster. Certainly, if a government is providing assistance to its citizens after the disaster, the people would lack the element of persecution, which is a key element to argue forced migration.

b. Persecution

If the above condition was fulfilled, this would lead us to the second issue that arises from the latter, why are people fleeing? Because they are in fear. Why are they in fear? Because they are being persecuted. However, are the victims of climate disasters subject to persecution? Apparently not. Constantly the courts of New Zealand and Australia are forced to deny many asylum applications in which the applicants argue that climate change (specifically the rise of the sea level) is threatening their lives. The main argument of the courts to dismiss the application is the lack of a persecutor that causes the well-founded fear. Such criteria is clearly described by the New Zealand Refugee Status Appeals Authority in relation to an asylum application from a Tuvalu citizen in which the court said:

“Claims based generally on ‘climate change’ do not meet this persecution mould. Part of the problem in the climate change context is identifying a ‘persecutor’. For example, the governments of Kiribati and Tuvalu are not responsible for climate change as a whole, nor are they developing policies

⁵ As mentioned previously, one of the conditions of being a refugee is the cross border movement (international displacement). Thus, as the 1951 Refugee Convention did not apply to internally displaced persons, on 04/17/1998 after the Representative of the Secretary-General on Internally Displaced Persons Mr. Francis M. Deng presented the Guiding Principles to the Commission on 02/11/1998, the UN Commission on Human Rights adopted a resolution taking note of the Guiding Principles on Internal Displacement. This legal framework for IDPs offers international standards to protect and assist internally displaced persons, *“(…) they identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.”* [UN Commission on Human Rights (1998). *Resolution 1998/50 (04/17/1998)*. UN doc. E/CN.4/1998/53/Add.2, February 11, 1998].

⁶ It may also happen that at the time of departure of a state the person left only due to another purpose such as business or study, however events subsequent to his departure would put him at risk in case he returns home. For example, refugee status was appropriately recognized in the case of a member of the then-ruling Pakistan People’s Party who was in Canada when the leaders of a military coup issued an arrest warrant against him. The 10 Federal Court of Appeal held that the applicant was a refugee sur place since his fear of being persecuted, while not extant at the time of his departure from Pakistan, was nonetheless well-founded on the basis of subsequent events. [James, H. & Foster, M. (2014). *The law of refugee status*. Cambridge, U.K.: Cambridge University Press, pg. 693.]

which increase its negative impacts on particular sectors of the population. Indeed, the Tuvaluan and Kiribati governments remain willing to protect their citizens, although the extent of their ability to do so over time is unclear. As noted above, one might argue that the ‘persecutor’ in such a case is the ‘international community’, and industrialized countries in particular, whose failure to reduce greenhouse gas emissions has resulted in the predicament now confronting them. These are the very countries to which movement might be sought if the land becomes unsustainable. This de-linking of the actor of persecution from the territory from which flight occurs is a complete reversal of the traditional refugee paradigm: whereas Convention refugees flee their own government (or private actors that the government is unable or unwilling to protect them from), a person fleeing the effects of climate change is not escaping his or her government, but rather is seeking refuge from—yet within—countries that have contributed to climate change.” (McAdam, 2012, p. 45)

From the resolution issued by the New Zealand Refugee Status Appeal Authority, it is clear that the interpretation of the Convention implies that persecution will be considered as such as long as it is man-made. Such persecution could be carried out either by the action or omission of a government through official agents, paramilitary groups or also by *de facto* authorities (UNHCR, 2011, p. 84). Regarding its effects, as was accurately mentioned by Hathaway and Foster, they must be “*sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made or an accumulation of various measures, including violations of human rights.*” (James & Foster, 2014, p. 196)

Following the previous paragraph, it is important to note that as the effects caused by the persecution under the current interpretation of the Convention implies a man-made act or omission that is carried out repeatedly and targeted to the violation human rights, it would not be possible to consider the occurrence of natural disasters as a form of persecution. The harm caused by natural disasters in the Pacific Islands is indiscriminate and caused by nature forces that are out of the control the government or non-state actors. Therefore, according to the current interpretation of the Convention the effects of a natural disaster could not be considered as a form of persecution as the effects they produce is not targeted to discriminate or harm someone due to specific characteristics. (Canada Federal Court of Justice, 2012, p. 196).

b.1) Lack of protection of Human Rights as equivalent to persecution.

Until now we have seen that under the current interpretation of persecution is not possible to include people affected by natural disasters under the protection of the Convention. The requirement of man-made persecution and targeted harm impose a barrier that “environmental refugees” currently cannot pass. However, on the other hand, Shacknove argues that persecution is only a part of a broader phenomenon: the absence of state protection of the citizen’s basic needs.

Following Shacknove’s argument, the term persecution focus only in the lack of protection of a tyrannical state which is focused on harming certain people due to their special characteristic, however it ignores a situation in which a government have disappeared or is unable to protect the human rights of its citizens (Shacknove, 1985, p. 277).

It is important to note that Shacknove is not dismissing the persecution as a way to access the refugee status. He is dismissing the interpretation in which the persecution is the **only** way a person can access the protection of the Convention, as he argues that the threat to human rights can be originated by other sources aside from persecution and in such cases the affected citizens should have the right to be protected by the Convention. In that sense, it is argued that “(...) *in refugee policy circles, basic threats to the individual are usually divided into three categories: persecution, vital (economic) subsistence and natural calamities.*” (Grahl-Madsen, 1981, p. 75-76).

As the focus of this essay is to review whether if “environmental displaced” are protected either by the Convention or the regional instruments, we will focus among the basic threats mentioned in the previous paragraph in the review of the natural calamities (natural disasters).

Despite the fact that it is not possible for a state to create or stop the occurrence of natural disasters such as earthquakes, hurricanes or landslides, some authors argue that it would be possible to attribute some extent of responsibility to a government over certain natural disasters due to their high emission of carbon dioxide,

the deforestation of certain areas, the lack of prevention, etc. Certainly, a government could argue that it is not responsible of such events as its occurrence go beyond human capabilities, however “*as writers such as Lofchie, Sen and Shue have demonstrated, natural disasters are frequently complicated by human actions*” (Shacknove, 1985, p. 279).

For explaining how human actions usually complicate the effects of natural disasters is convenient to separate the phases of a natural disasters into two: prevention and aftermath. Regarding prevention, the effects of events can get worse by ineffective policies and corruption. For example, in Peru there is a flooding season during the first three months of the year. However, despite the fact that such event happens every year and there are specialized entities that aims to reduce its effects and protect the population, due to the lack of action of such entities, casualties rise every year. Regarding the aftermath of the floodings in Peru, the government is obliged to carry out campaigns to protect its citizens and ensure they have access to their basic needs. However, in this case, due to the lack of effective policies, more lives are lost due to diseases and deprivation of basic facilities than by the disaster itself.

Hence, sometimes the damage apparently caused only by a natural disaster may, “*on closer scrutiny, reveal state negligence or indifference. As with threats to physical security, when the state is unwilling or unable to protect a citizen from the life-threatening actions of others, the basis for a legitimate claim to refugeehood is generated.*”

Until now it is clear that under the current interpretation of persecution is not possible to include people affected by natural disasters under the protection of the Convention. A natural disaster (either of sudden or slow onset) by itself will not be enough to argue persecution unless the government or a non-state actor would carry out activities that harm a person or a group of people. Hence, the victims of natural disasters that are forced to leave their country have no access to international protection.

b.2) “Environmental Refugees” as a Particular Social Group

In spite of the aforementioned, governments have refused to extend the interpretation of the refugee definition to include the “environmental refugees” as it would overwhelm their current institutional capacities (Docherty & Giannini, 2009, p. 349). However, some scholars have argued that the “environmental refugees” could be included in the definition of refugee provided by the Convention.

There have been proposals to include “environmental refugees” within the category of particular social group. However, in order to qualify as a social group, as mentioned in *Ward v Canada*, the group of people must be united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it (Supreme Court of Canada, 1993). In the case of a group of people that is being ignored by the authorities in the aftermath of a natural disaster, they would not fulfill the requirement to be considered as a social group as victimization towards the harm of a state or a third party is not considered to be a fundamental characteristic to the people’s human dignity.

After reviewing the elements of the Convention, it is clear that with its current interpretation, “environmental refugees” are excluded and not subject to protection. Considering climate related disasters are occurring more often and the amount of displaced people fleeing their country due to natural disasters is rising every day, such exclusion seems irresponsible and creates a scenario in which those people must live irregularly in a third country with no right to work, healthcare or education. Considering this, we are forced to look into regional instruments, specially the Cartagena Declaration, in order to determine if its broad refugee definition might provide safe haven to “environmental refugees”.

III. The extended Refugee definition under the Cartagena Declaration

In 1984, due to the mass influx of migrants in Central America, the governments of Latin America and the Caribbean met in the city of Cartagena de Indias, Colombia and signed a non-binding declaration⁷ related to

⁷ As mentioned previously, the Cartagena Declaration is not an international treaty and is not legally binding for the Latin-American states. However, some jurists like Hector Gros Espiell, former president of the Inter-American Court of Human Rights, argues that the Cartagena Declaration has acquired strength and validity as a source of International Law due to having achieved the character of

the status of refugees in the whole continent. In such declaration, the involved parties decided to broaden the refugee definition of the Convention following the precedent of the OUA and the reports issued by the Inter American Court of Human Rights.

It is important to note that in the 80s, many countries in America were undergoing dictatorships or internal wars with paramilitary or terrorist groups. Considering this, the aim of the broadened definition was to grant protection to the displaced people due to war or violation of human rights as we can review in the conclusion 3 of the declaration:

“[...] persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order” (Cartagena Declaration on Refugees, 1984).

Following the aforementioned, the fact that the conflicts that occurred in the American continent in the 80s, motivated the creation of the expanded definition is supported by the fact that four out of five elements included in the definition⁸ are related with situation of conflict. Certainly, it seems that the serious disturbance of public order might include causes other than conflict; however, the CIREFCA report has argued that such public order disturbance must be a result of acts of men such as riots, rebellions, sporadic acts of violence or other acts of similar nature as long as they seriously disturb the public order. (Conferencia Internacional Sobre Refugiados Centroamericanos ‘International Conference about Centroamerican Refugees’ (CIREFCA), 1989, p. 11)

As mentioned before, the Cartagena Declaration includes under its scope the protection of people that are being harmed in situations of indiscriminate violence. Considering this, it would be incorrect to expect the individualization of the harm or an act of discrimination due to political opinion, race, religion, particular social group, etc., as the purpose of the Declaration is to provide protection to the people that lack the protection of the Convention due to the absence of targeted violence (Cantor & Trimiño, 2015).

Such element is the one that differentiates the Cartagena Declaration with the Convention, due to the fact that it would be redundant if both instruments were focused on the targeted persecution. Unlike the Convention, Cartagena Declaration was created to answer to the reality of the American continent in which the displacement of people was mainly caused by situation of indiscriminate violation of human rights.

It is important to note that the broadened refugee definitions provided by regional instruments do not imply the replacement of the Convention within the American or African continent. As it was clearly stated in the UNHCR Guideline related to the Refugee Status and Resettlement, “only if it has been established that an applicant does not meet the eligibility criteria of the 1951 Convention definition should UNHCR proceed to consider whether he/she comes within the wider category of person who are also refugees under UNHCR’s mandate” (UNHCR, 2011, p. 81).

a) Definition of Serious Disturbance of Public Order

Although the Cartagena Declaration tries to fill a lacuna in the protection of displaced people, such protection seems incomplete as some authors does not attribute to the Declaration the possibility of protecting people affected by climate change, specially by the restrictive interpretation of “Public Order”. From this point of view, the definition of public order seems restrictive as it does not cover the situation of millions of people in America trying to flee their country due to natural disasters. Such scenario occurred in 2012 when a max flux of migrants from Haiti entered into Latin America fleeing their country due to the earthquake and hurricanes that hit Haiti between 2010 and 2012. During this crisis, Latin American countries had to give the Haitian people a “Latin American regional custom” (general practice that is accepted as a law). For this reason, the States concerned would be obliged to evaluate its application in the context of refugee status determination procedures. Likewise, the subsequent practice of the States is relevant to interpret the scope of their conventional obligations in order to the guidelines of the Inter-American Court of Human Rights (OC21/14) and its jurisprudence regarding the control of conventionality. [Gros-Espiell, H. (1994). ‘La Declaración de Cartagena como fuente del Derecho Internacional de los Refugiados en América Latina’. *Memoria Coloquio Internacional: 10 Años de la Declaración de Cartagena sobre Refugiados*. San Jose, Costa Rica: UNHCR – IIDH, pg. 268; Mondelli, J.I. (2018). *La fuerza vinculante de la definición regional de la Declaración de Cartagena sobre Refugiados (1984)*. San Jose, Costa Rica. Retrieved from <https://www.refworld.org/es/pdfid/5d03dob54.pdf>]

8 Such as *i)* generalized violence; *ii)* foreign aggression; *iii)* internal conflicts; and, *iv)* other circumstances which have seriously disturbed public order.

a temporary residence permits since the current interpretation of the Cartagena Declaration did not protect people displaced by natural disasters. Having said that, in the following part we will review the definition of Public order and determine if natural disasters can be included in its definition.

Cantor considers the serious disturbance of public order as a “*disturbance that extends beyond the merely local to one that has broader national implications, even if the events themselves are confined to a particular region of the state territory. The use of the term “serious” in the context of “public order” clearly signals a disruption of the social order of the country.*” (Cantor, 2013, p. 3).

Considering such definition, a question arises, what does the term public order seek to protect? The social order of a country, which “refers to the organization of many inter-related parts of a society that is built on social relationships between and among people and all of society’s parts” (Cole, 2017). Therefore, considering a society is mainly built by the interaction between its citizens and the government, the elemental rights to maintain the social order would be the life, safety and freedom among its members, rights that must be protected by the government through the satisfaction of their basic needs.

Throughout the history, the social order of states has been threatened by internal and external factors. Although the nature or intensity of the threat varies over time, it is known that the primary source of disruption is created inside a society by organized crime or paramilitary groups.

However, there are certain threats that due to its magnitude have the capability to disrupt the public order in such a serious way that the government cannot guarantee the life, safety and freedom among its citizens. Such scenarios are the ones that are considered when talking about serious disturbance of public order. In this scenario, the disturbance of public order does not come from the natural disaster itself but for the inability of a state to protect the organization of the society and the rights of its citizens⁹. This is supported by Cantor who says that the underlying characteristic of the disturbance of public order is that the harm should have a political or institutional origin otherwise it might fall beyond the scope of the definition (Cantor, 2013, p. 3).

Following the aforementioned, it is safe to assume that its current interpretation does not provide protection to displaced people due to natural disasters as according to CIREFCA and the arguments provided by Cantor, the disturbance of public order must be man-made.

Therefore, in order to provide protection to the environmentally displaced, the arguments used by practitioners and policy makers must be focused not in the climate disasters themselves, but by the inability of a state to satisfy the basic needs of its citizens in the aftermath of the disaster.

IV. Conclusion

After an extensive review of the provisions of the 1951 Convention and the Cartagena Declaration, we conclude that:

The current international refugee regulation excludes “environmental refugees” from obtaining protection when they are forced to flee their countries due to natural disasters. Provided that the number of people being displaced by natural disasters is increasing due to the effects of climate change, such exclusion seems irresponsible and creates a scenario in which those people must live irregularly in a third country with no right to work, healthcare or education, especially in an unfavorable context of adoption of political measures by host states –that even can be considered as “opportunistic” or “populist”– as the United States withdrawal from

⁹ In that sense, it is important to note that the manner in which UNHCR and other multilateral actors can assist in this process will depend on the precise characteristics and context of this break-down in national protection. It is possible to distinguish four categories of such a break-down –that are not mutually exclusive: *i) failed state*: characterized by the absence of a centralized authority, and a situation of general anarchy, such that there is no authority to provide effective national protection; *ii) weak state*: which has a semblance of authority, but is unable to exercise effective power over all of its territory. Authority may be limited geographically, or in terms of the ability to carry out state functions; *iii) conflicted or contested state*: while the state is not necessarily weak as such, there is a conflict between groups for control of the state, or specific geographical areas within the state. The state may be willing to extend national protection only to people from particular groups or regions; and, *iv) repressive state*: which exercises authority but does not extend protection to all or its citizens. By definition, repressive states command strong central authority, and are able to crush potential rebellions and outbreaks of violent conflict. [UNHCR (1992). *Oversight issues: Reintegration*. *Oversight issues: Reintegration*. EC/48/SC/CRP.15. Standing Committee (04/02/1998), section 3.1]

the 2015 Paris Agreement on climate change mitigation which marks a negative trend on the recognition of climate change, or the adoption of stricter migration policies in some European countries.

Despite isolated cases such as Sweden or Finland that have included the figure of “environmental migrant” in their domestic legislation, most states remain indifferent to the situation of displaced people displaced due to environmentally related causes.

In Latin America, although the Cartagena declaration provides a broad interpretation that a priori seems to be able to comprehend “environmental refugees” the common interpretation of its provisions does not allow them to obtain protection. However, some authors promote an even broader interpretation (especially of the term of Public Order) which would allow the victims of climate disasters to access to the refugee system as long as their government is not able to protect their human rights.

Although a broad interpretation that could include “environmental refugees” seems morally right as the displaced due to natural disasters are increasing every day, their inclusion might be counter-productive due to the fact the massive influx of refugees that would be recognized would exceed the capacity of the host countries. Therefore, the inclusion of “environmental refugees” would decrease the number of countries that are willing to be a safe haven due to the fear of being overloaded with refugees and the consequences that entails.

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